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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DEKALB GENETICS CORPORATION
Petitioner,

v.

BAYER CROPSCIENCE, S.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD L. STANLEY
HOWREY SIMON ARNOLD & WHITE, LLP
750 Bering Drive
Houston, TX 77057
(713) 787-1400

SETH P. WAXMAN
Counsel of Record
DAVID W. OGDEN
PETER B. RUTLEDGE
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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QUESTION PRESENTED

The Federal Circuit affirmed a $50 million punitive damages award in a business case in which the jury awarded only a single dollar in nominal damages. The question presented is whether the court erred in ruling, in conflict with decisions of this Court and other courts of appeals, that such an award satisfies due process where the court found:

(1) "reprehensibility" solely on the basis of an inference that the jury might have found the defendant's witnesses not credible (and declared *de novo* review of such a finding "essentially meaningless");

(2) "proportionality" by reference not to the actual or potential harm to the plaintiff, but rather solely to the amount of defendant's profits ordered forfeited as unjust enrichment; and

(3) "comparability" without considering the applicable state's punitive damages cap, on the grounds that the statute was enacted after the conduct in question.

PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court are DeKalb Genetics Corporation and Bayer CropScience, S.A.

The parties to the proceeding before the Court of Appeals for the Federal Circuit were DeKalb Genetics Corporation, Monsanto Company and Rhône-Poulenc Agro, S.A.

While the case was pending before the Federal Circuit, Rhône-Poulenc Agro, S.A. merged with Aventis CropScience, S.A. At Rhône-Poulenc's request, the Federal Circuit recaptioned the case to reflect that change. Subsequently, Aventis CropScience, S.A merged with Bayer AG, and the resulting entity was named Bayer CropScience, S.A. Counsel for Respondent has informed counsel for Petitioner that, as a result of these mergers, neither Rhône-Poulenc Agro, S.A. nor Aventis CropScience, S.A. continues to exist as a separate legal entity and that Bayer CropScience, S.A. has replaced Rhône-Poulenc Agro, S.A. as the proper party to these proceedings.

CORPORATE DISCLOSURE STATEMENT

At the time of the events giving rise to this case, DeKalb Genetics Corporation was an independent, publicly traded, family controlled corporation. Presently, DeKalb is a wholly owned subsidiary of the Monsanto Company, a publicly traded company, which in turn is partially owned by the Pharmacia Corporation, also a publicly traded company.

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Supreme Court of the United States

No. 02-____

DEKALB GENETICS CORPORATION,
Petitioner,

v.

BAYER CROPSCIENCE, S.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner DeKalb Genetics Corporation respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS AND JUDGMENT BELOW

The opinion of the Court of Appeals (App. 1a-37a) is reported at 272 F.3d 1335 (Fed. Cir. 2001). The Court's order denying rehearing (App. 39a) is not reported. The opinion of the district court (App. 41a-155a) is not reported.

JURISDICTION

The opinion of the Court of Appeals was issued on November 19, 2001. The Court of Appeals denied DeKalb's

petition for rehearing and for rehearing *en banc* on March 26, 2002. On June 10, 2002, the Chief Justice extended the time to file this petition until July 24, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

The General Statutes of the State of North Carolina provide: "Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount." N.C. Gen. Stat. § 1D-25(b) (2001).

STATEMENT OF THE CASE

The Federal Circuit affirmed a punitive damages award of $50 million notwithstanding that: (1) it conceded the case presents *none* of the reprehensibility criteria set forth in this Court's decisions, and that the criterion it substituted rendered "independent appellate review . . . essentially meaningless"; (2) the jury awarded nominal damages of only *one dollar*; and (3) state law in effect at the time the complaint was filed limits punitive damages awards to the greater of three times compensatory damages, or $250,000. The award is based on a single incident of nondisclosure in a business dispute between sophisticated corporate entities. It is the largest punitive damages award ever to survive appeal under North

Carolina law,[1] and one of the largest for a business tort ever to survive federal appellate review.[2]

1. The $50 million punitive award arises out of a cooperative undertaking to develop a type of herbicide-resistant corn. In 1985, Petitioner DeKalb Genetics Corporation ("Petitioner" or "DeKalb") entered into an agreement with a predecessor in interest of Respondent, under which DeKalb received genetic constructs and an exclusive patent license to develop corn resistant to glyphosate, a commonly used herbicide.[3] (App. 42a-43a.) In February 1994, DeKalb notified Respondent that it had successfully grown glyphosate-resistant corn plants in a greenhouse. (App. 45a.) DeKalb informed Respondent that it would conduct field experiments that summer. (*Id.*) Some of those tests ("the Hawaii field tests") were successful. (*Id.*) Following their completion, in September 1994, a DeKalb researcher informed Respondent by letter that the results DeKalb had obtained to date were "very encouraging"; the letter, however, did not specifically reference the success of the Hawaii field tests. (App. 46a.)

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[1] *See* Brian Timothy Beasley, Survey, *North Carolina's New Punitive Damages Statute: Who's Being Punished Anyway?*, 74 N.C. L. Rev. 2174, 2190-94 & nn.125-38 (1996) (noting that the highest award under North Carolina law between 1986 and 1996 was $6 million). Petitioner's own research reveals only one punitive damages award under North Carolina law larger than the one in this case; the judgment in that case was reversed on appeal on grounds unrelated to the punitive damages award. *See Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998).

[2] Petitioner has located only one reported federal appellate decision upholding a larger punitive damages award based upon a business tort. *See United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1233 (10th Cir. 2000), *aff'd on other grounds*, 532 U.S. 588 (2001).

[3] Respondent, appellee below, previously was known as Rhône Poulenc Agro, S.A. As a result of various mergers, *see supra* at p. ii, it is now know as Bayer CropScience, S.A. For the Court's convenience, the petition refers to Bayer CropScience, S.A. and its predecessors as "Respondent."

During the summer of 1994, while DeKalb was still conducting the Hawaii field tests, Respondent filed a patent infringement lawsuit against a third party, the Monsanto Company, alleging that Monsanto was unlawfully using patented technology to develop and sell glyphosate-resistant soybeans. (*Id.*) To settle that litigation, Respondent, DeKalb, and Monsanto signed two agreements under which (1) DeKalb agreed to share with Monsanto the rights Respondent had granted it with respect to corn and (2) Respondent granted DeKalb a non-exclusive, royalty-free license to use and sell the genetic constructs used in glyphosate-resistant corn, including the one used in the Hawaii field tests ("the 1994 Agreement"). (App. 46a-47a.) Thereafter, DeKalb and Monsanto continued research and eventually developed a commercial line of glyphosate-resistant corn seeds successfully marketed under the brand name "Roundup Ready®" corn. (App. 47a.)

2. In October 1997, Respondent commenced the instant litigation against DeKalb and Monsanto. Respondent alleged, *inter alia*, that by failing to disclose the results of the Hawaii field tests, DeKalb fraudulently induced Respondent to enter into the 1994 Agreement on terms unduly generous to DeKalb. (App. 53a.) Respondent conceded at trial that "no active lie . . . was sent to [it]" (App. 163a), and the court of appeals recognized that this case involved only a failure to disclose (App. 12a-13a). Respondent did not deny that at the time it signed the 1994 Agreement it knew both that DeKalb was conducting the Hawaii field tests and that earlier greenhouse tests had been successful, and Respondent acknowledged having received DeKalb's unsolicited disclosure that "results . . . have been very encouraging." Nonetheless, the jury found that DeKalb's failure affirmatively to disclose the specific results of the Hawaii field tests had fraudulently induced Respondent to enter into the 1994 Agreement. (App. 67a.)

As permitted by North Carolina law, Respondent elected to recover "unjust enrichment" in lieu of damages measured by its own injury.[4] (App. 136a.) It also sought punitive damages. (App. 142a.) With respect to the latter, the judge instructed the jury to consider ten factors, including, among others, DeKalb's financial status or position, DeKalb's profits from its conduct, the degree of reprehensibility of DeKalb's conduct, the injury which could have occurred from DeKalb's conduct and the injury which did occur from DeKalb's conduct. (App. 161a.)[5] The jury awarded Respondent one dollar in nominal damages, $15 million for DeKalb's unjust enrichment, and $50 million in punitive damages. (App. 49a.) According to the district court, the "unjust enrichment" award was based on two-years' profit on DeKalb's "Roundup Ready®" corn seed sales. (App. 145a.)

The district court upheld the jury's finding of fraud based on a "preponderance of the evidence" standard. Previously, the court had acknowledged that Respondent's fraud claim was a "close question" and that Respondent's evidence would not have sufficed if North Carolina, like most states, required proof of fraud by "clear and convincing evidence." (App. 159a.) Notwithstanding the acknowledged weakness of the fraud case, the court rejected DeKalb's argument that the $50 million punitive damages award was unconstitutionally excessive. (App. 146a-147a.)

3. A panel of the Court of Appeals for the Federal Circuit affirmed. The court recognized that in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424

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[4] *See Parker* v. *White*, 71 S.E.2d 122, 128 (N.C. 1952) (North Carolina fraud plaintiffs have the right to make such an election).

[5] The district court opinion cites a punitive damages instruction from a different phase of the trial not relevant to this appeal. (App. 143a). The correct instruction is reproduced in the Appendix (App. 161a).

(2001), this Court required that appellate courts assess *de novo* whether a punitive damages award is excessive according to three constitutionally mandated guideposts.

With respect to the first guidepost—reprehensibility—the court acknowledged that "the facts . . . do not demonstrate any of the criteria enhancing reprehensibility mentioned in *Gore*." (App. 18a.) Instead, the court found sufficient reprehensibility to support the $50 million award based on a criterion of its own invention: the possibility that the jury had concluded that "the DeKalb witnesses alleged to have concealed the Hawaii field tests" were not credible, based on "several rather implausible explanations and assertions" made during their trial testimony. (*Id.*) Assuming that the jury's "evident" negative assessment of DeKalb's witnesses' credibility supplied "much of the determination of reprehensibility" in the case (*id.*), the Federal Circuit concluded that the *de novo* review mandated by *Cooper* was "essentially meaningless" here. (App. 16a) (stating that where "the judgment-call on reprehensibility can be traced to a jury's assessment of witnesses, independent appellate review is essentially meaningless").

Turning to *Gore*'s second guidepost—the ratio between the punitive damages award and the plaintiff's harm—the Federal Circuit reasoned that the proper metric for comparison was not the one-dollar award of nominal damages but the entire $15 million unjust-enrichment award based not on Respondent's harm but on DeKalb's profits. (App. 20a-21a.)

With respect to *Gore*'s final guidepost—a comparison of the punitive damages award with comparable statutory penalties—the court acknowledged that a North Carolina statute (N.C. Gen. Stat. § 1D-25 (2001)) limited punitive damages to the greater of $250,000 or three times the amount of compensatory damages. (App. 22a.) The court declined to consider that statute, however, because it had been enacted after the conduct giving rise to Respondent's fraud claim. (App. 23a.)

4. The court denied without comment DeKalb's petition for rehearing or rehearing *en banc*. (App. 39a.)

REASONS FOR GRANTING THE WRIT

This case, like *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, No. 01-1289 (cert. granted June 3, 2002), manifests flagrant misapplication of the framework this Court has established for independent proportionality review of punitive damages awards. *See Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559 (1996). Here, the wayward decision comes not from a state court but rather from the United States Court of Appeals for the Federal Circuit, which has also created a conflict with decisions of other courts of appeals and state courts concerning key aspects of the framework set forth in *Cooper Industries* and *Gore*.

With respect to the *first* of the three constitutional guideposts established by this Court, the Federal Circuit misconceived its obligation independently to ensure that punitive damages are proportional to the reprehensibility of the conduct at issue. In the acknowledged absence of even a single criterion identified in *Gore*, the Federal Circuit found sufficient "reprehensibility" to justify the $50 million award based upon its supposition that the jury "might" not have credited the trial testimony of DeKalb's defense witnesses (App. 24a)—a factor found nowhere in *Gore* and logically unconnected to the reprehensibility of the underlying conduct. The court flouted the *de novo* review requirement of *Cooper Industries*, declaring that where a punitive award might have been founded on credibility determinations of this kind, *Cooper Industries'* mandate is "essentially meaningless." (App. 16a.)

With respect to the *second* constitutional guidepost, the Federal Circuit fundamentally misapplied the requirement that punitive damages reflect a reasonable ratio to the "*harm to the victim* caused by the defendant's actions." *Cooper In-*

dustries, 532 U.S. at 435 (emphasis added). Measuring the $50 million punitive award against the jury's directed forfeiture of $15 million in unjust enrichment (App. 19a-21a), the court of appeals failed to recognize that this award of DeKalb's profits was *itself* partially punitive in nature. The court made no effort to ascertain what portion of the unjust enrichment award actually compensated Respondent for its injuries—thus rendering the court's treatment of the "ratio" guidepost just as "meaningless" as its reprehensibility analysis.

In applying the *final* constitutional guidepost, the Federal Circuit noted that in *Gore* this Court considered a later-enacted statute in evaluating "comparability." (App. 22a-24a.) Yet the court below refused to consider North Carolina's later-enacted statutory cap on punitive damages. (App. 23a-24a.) The Federal Circuit's stated reasoning—that post-conduct enactments fail to provide notice of potential penalties to the tortfeasor at the time he acted—contravenes this Court's direction in *Gore* that the touchstone of the comparability guidepost is not notice but deference to legislative judgment.

In the face of these manifest errors, this Court should review this case, in addition to *State Farm*, to articulate definitively the standards under which appellate courts should apply independent review of large punitive damages awards. At a minimum, the Court should hold this case pending disposition of *State Farm*.

I. THE FEDERAL CIRCUIT'S STANDARD FOR REVIEWING LARGE PUNITIVE DAMAGES AWARDS MISAPPLIES DECISIONS OF THIS COURT, CONFLICTS WITH OTHER COURTS OF APPEALS, AND RENDERS "ESSENTIALLY MEANINGLESS" REVIEW OF PUNITIVE DAMAGES AWARDS.

In 1994 this Court commenced a line of decisions recognizing that substantively unreasonable punitive damages awards violate the Due Process Clause. In *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), the Court invalidated an Oregon law prohibiting judicial review of a jury's punitive damages award unless the reviewing court could find no evidence to support the verdict. In *Gore*, 517 U.S. at 574-75, the Court found a $4 million punitive damages award constitutionally infirm and set forth three guideposts—reprehensibility of the conduct, ratio to harm, and comparability with other punishments—for determining whether such awards were "grossly excessive" and therefore unconstitutional. Most recently, in *Cooper Industries*, 532 U.S. at 443, the Court held that appellate courts must review the jury's award *de novo* under the *Gore* guideposts.

In the face of these decisions, the Federal Circuit upheld a $50 million punitive damages award in a gossamer-thin fraud case involving sophisticated business entities.[6] To be sure, the court below recited the constitutional principles set

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[6] As noted *supra* at p. 5, the district court conceded that the verdict could not have survived a requirement of clear and convincing evidence. That is hardly surprising, since Respondent conceded that DeKalb never affirmatively misrepresented any fact (App. 163a) and its cornerstone evidence consisted of a letter from DeKalb reporting that the allegedly suppressed test results were "very encouraging" (App. 46a, 61a). Even the court of appeals acknowledged that respondent had produced no "smoking gun" evidence of a "plan" by petitioner to defraud respondent (App. 12a), and that "[c]ertainly, [Respondent] could have done more to police their own technology" (App. 13a).

forth in this Court's recent decisions in this area. "[I]ts application of them," however, "is nothing short of baffling." *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 510 (2001) (*per curiam*) (summarily reversing lower court opinion for its facially accurate recitation but erroneous application of this Court's precedents); *Central State Univ.* v. *American Ass'n of Univ. Professors*, 526 U.S. 124 (1999) (*per curiam*) (same). In virtually every respect—*de novo* review and each constitutional guidepost—the Federal Circuit's decision establishes an approach that effectively nullifies the structured judicial oversight of punitive damages this Court's decisions require. The Court should grant review for that reason alone. Moreover, the Federal Circuit's approach conflicts in several respects with the decisions of other courts of appeals and state courts, such that review of punitive damages awards in the Federal Circuit differs substantially from the framework applied in other jurisdictions.

A. The Federal Circuit's Reprehensibility Analysis Is Inconsistent With *Gore*, Conflicts With Other Courts, And—As The Federal Circuit Itself Conceded—Renders "Essentially Meaningless" *Cooper Industries*' Requirement Of *De Novo* Judicial Review.

In *Gore*, this Court stated that the reprehensibility of the defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." 517 U.S. at 575. *Gore* articulated a series of criteria designed to aid courts in their review to ensure that punitive damages awards are calibrated to the reprehensibility of the defendant's conduct and are not the product of arbitrary jury action. Those factors include: (1) whether the harm was physical, as opposed to economic; (2) whether it evinced an indifference to or reckless disregard for the health and safety of others; (3) whether the target of the misconduct was financially vulnerable; and (4) whether defendant's conduct involved repeated actions or was merely a single incident.

Gore, 517 U.S. at 576-77; *see also TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 482 (1993) (O'Connor, J., dissenting) (noting that the case was "not a case involving grave physical injury imposed on a helpless citizen by a callous malefactor. Rather, it [was] a business dispute between two companies . . . .").

The Federal Circuit's decision is irreconcilable with *Gore*. The court below conceded that "the facts alleged herein do not demonstrate *any* of the criteria enhancing reprehensibility mentioned in *Gore*, such as an act of violence, disregard for the health and safety of others, a pattern of misconduct, or the exploitation of a financially vulnerable target." (App. 18a) (emphasis added). Indeed, the tort in this case closely resembles the one in *Gore*, 517 U.S. at 576, which also involved the non-disclosure of commercial information, as to which the Court set aside a far smaller punitive award because "none of the aggravating factors associated with particularly reprehensible conduct is present."

Here, the Federal Circuit held that the reprehensibility guidepost was satisfied—and supported an award of *$50 million*—exclusively because the jury "may" have concluded that two of DeKalb's witnesses were not credible when they testified about the reasons for their actions. (App. 24a.) The court thus relied on a factor of its own invention: that "the [jury's] determination of reprehensibility depend[ed] in meaningful part upon the credibility of witnesses." (App. 18a.) Neither *Gore* nor any other decision of this Court identifies witness credibility (or any other factor apart from the tortious conduct itself) to be among the factors pertinent to the reprehensibility guidepost. By hinging its reprehensibility determination on witnesses' courtroom behavior long post-dating the acts giving rise to the underlying cause of action, the court below rendered the judicial review of reprehensibility required in *Gore* virtually worthless. Almost every tort case will involve witness testimony and credibility determinations.

The pernicious effect of this holding is intensified by the Federal Circuit's further determination that, "to the extent that the judgment-call on reprehensibility can be traced to a jury's assessment of witnesses, *independent appellate review is essentially meaningless*." (App. 16a) (emphasis added). Because the Federal Circuit concluded that the jury "'may' or 'might' have concluded" that DeKalb's witnesses were not credible (App. 24a), it deferred to the jury's presumed finding and sustained the award on that basis. That extreme deference was flatly inconsistent with *Cooper Industries*, which requires reviewing courts to conduct a *de novo* review of the entire excessiveness determination—not merely bits and pieces of it. 532 U.S. at 441 ("[O]ur own consideration of *each* of the three *Gore* factors reveals a series of questionable conclusions by the District Court that may not survive *de novo* review.") (first emphasis added). Thus, the Federal Circuit flouted *Cooper Industries* as well as *Gore* when it declared credibility determinations to be sufficient in themselves to constitute reprehensibility and announced this Court's mandate for *de novo* review to be "essentially meaningless" with respect to such determinations.

Unsurprisingly, the Federal Circuit's reprehensibility analysis has created a split with other circuits and state courts, in three different respects. *First*, the Federal Circuit stands alone in refusing to reduce a punitive damages award when none of the reprehensibility factors mentioned in *Gore* is present. The Third, Eighth, Ninth, and Eleventh Circuits have all found punitive damages awards to be unconstitutionally excessive based in part on the total absence or weak presence of the reprehensibility factors set forth in *Gore*. *See, e.g.*, *Leatherman Tool Group, Inc.* v. *Cooper Indus., Inc.*, 285 F.3d 1146, 1150-51 (9th Cir. 2002); *In re Exxon Valdez*, 270 F.3d 1215, 1242 (9th Cir. 2001); *Inter Med. Supplies, Ltd.* v. *EBI Med. Sys., Inc.*, 181 F.3d 446, 467 (3d Cir. 1999); *Watkins* v. *Lundell*, 169 F.3d 540, 547 (8th Cir. 1999); *Johansen* v. *Combustion Eng'g, Inc.*, 170 F.3d 1320, 1336 (11th Cir. 1999). Not one of these decisions even con-

sidered the possibility that witnesses' lack of credibility could substitute for reprehensibility for these purposes.

Second, the Federal Circuit's reprehensibility analysis conflicts with the approach of the Third and Tenth Circuits, as well as the Wisconsin Supreme Court, over the reprehensibility of a defendant's conduct in the business setting. These courts all found a defendant's conduct not sufficiently reprehensible—and therefore vacated or remitted a substantial punitive award—in significant part because, as in this case, it involved only a business-to-business tort. *See, e.g.*, *Inter Med. Supplies*, 181 F.3d at 467 (finding $50 million punitive damages award, already remitted by district court from over $100 million, unconstitutionally excessive and further remitting to $1 million); *FDIC* v. *Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) (finding $1.2 million punitive damages award unconstitutionally excessive and remitting to $264,000); *Continental Trend Res., Inc.* v. *Oxy USA Inc.*, 101 F.3d 634, 638 (10th Cir. 1996) (finding $30 million punitive damages award unconstitutionally excessive and remitting to $6 million); *Management Computer Servs., Inc.* v. *Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 82-83 (Wis. 1996) (finding $1.75 million punitive damages award unconstitutionally excessive and remitting to $650,000). For example, the Tenth Circuit, heeding *Gore*'s instruction that "some wrongs are more blameworthy than others," 517 U.S. at 575, concluded that "[p]urely economic harm may warrant less punishment than harm to the health or safety of individuals. But 'infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty.'" *Oxy*, 101 F.3d at 638 (quoting *Gore*, 517 U.S. at 576). Embracing this reasoning, the Third Circuit likewise concluded that a defendant's conduct was not especially reprehensible when the harm was "economic, rather than physical," the injury arose "out of a contractual relationship" and the plaintiff was "not a financially weak or vulnerable tar-

get." *Inter Med.*, 181 F.3d at 467. The Federal Circuit failed even to acknowledge these important considerations.

Third, the Federal Circuit's decision creates a division of authority over the extent to which a court conducting an excessiveness inquiry can defer to the jury's findings in determining that the defendant's conduct was reprehensible. Following *Cooper Industries* and *Gore*, the First and Ninth Circuits and the Alabama Supreme Court all have independently analyzed the reprehensibility of a defendant's conduct without deferring to the jury's findings—much less findings the jury "*might*" have made en route to a general verdict. *See, e.g.*, *Exxon Valdez*, 270 F.3d at 1239; *Zimmerman* v. *Direct Fed. Credit Union*, 262 F.3d 70, 82 (1st Cir. 2001); *Horton Homes Inc.* v. *Brooks*, No. 1000346, 2001 WL 1520623 (Ala. Nov. 30, 2001). For example, in *Exxon Valdez*, 270 F.3d at 1239, the Ninth Circuit (without discussing the jury's possible evaluation of Exxon's witnesses) mandated a careful review of the defendant's conduct giving rise to liability under each of the reprehensibility factors articulated in *Gore* (reversing the district court which observed that the jury may have believed that Exxon's management did not show sufficient remorse at trial. *In re Exxon Valdez*, No. A89-095 (HRH), Order No. 267, 1995 WL 527988, at *11 (D. Alaska Jan. 27, 1995)). The Ninth Circuit's approach is the polar opposite of the Federal Circuit's "essentially meaningless" reprehensibility review.[7]

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[7] In addition to the errors and conflicts set forth in text, the Federal Circuit's decision is incompatible with the reasoning of *Oberg*. Even if some scintilla of evidence might support a jury's punitive damages award, *Oberg* stands for the proposition that a court must ascertain whether the *amount* of the award—here $50 million—was justified. *See* 512 U.S. at 429 (recognizing "possibility that a culpable defendant may be unjustly punished; . . . some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing"); *see also Gore*, 517 U.S. at 588 (Breyer, J., concurring and joined by O'Connor and Souter, JJ.) (noting that Alabama standard did not "readily distin-

B. The Federal Circuit's Analysis Impermissibly Skews The Ratio Between The Punitive Award And The Harm To Respondent In A Manner Fundamentally Inconsistent With *Cooper Industries.*

Cooper Industries instructs courts to consider "the relationship between the penalty and the *harm to the victim* caused by the defendant's actions." 532 U.S. at 435 (emphasis added). Here, Respondent introduced no evidence of *any* harm it may have suffered—choosing instead to recover DeKalb's profits. The jury accordingly awarded Respondent one dollar in nominal damages. Obviously a 50-million-to-one ratio of punitive damages to harm is "grossly excessive." *See Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23 (1991) (declaring 4:1 ratio to be "close to" the constitutional line).

The Federal Circuit concluded, however, that the ratio in this case was more properly calculated as 3 1/3-to-1, because Respondent received DeKalb's *profits*—$15 million—as an award of "unjust enrichment." The court of appeals deemed that the full amount of DeKalb's profits was the appropriate measure of Respondent's harm because "the unjust enrichment of DeKalb *relates to* the bad actions of DeKalb and resultant harm to [Respondent]." (App. 21a); *see id.* ("[T]he unjust enrichment gained by DeKalb is *logically related to* the harm or potential harm caused [Respondent] . . . .") (emphasis added). But to say that DeKalb's profits may "relate to" Respondent's harm or potential harm in some fashion is not to say that they *constitute* harm or potential harm in their

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guish[ ] between conduct warranting very small, and conduct warranting very large, punitive damages awards"). The fatal defect in the Oregon statute invalidated in *Oberg* was that it enabled a reviewing court to determine only whether a plaintiff was entitled to recover some punitive damages, but did not afford reviewing courts the opportunity to evaluate the size of the award. The Federal Circuit's approach accomplishes the same unconstitutional result via judicial decision.

entirety.[8] To the contrary, it is obvious that, even with full disclosure of the Hawaii field tests, Respondent would have had no more than a somewhat improved "opportunity to *participate* in the commercial success of the resultant . . . corn products" (App. 21a (emphasis added)), and it is absurd to suppose that Respondent's lost royalties would have captured all of DeKalb's profit. Indeed, Respondent presumably chose to prove and recover DeKalb's profits rather than its own injury because it believed that DeKalb's profits were significantly greater. Beyond its bland assertion of some undefined relationship, the Federal Circuit made no effort to ascertain the nature of that relationship or the specific amount of the profits that would likely have been earned by Respondent instead of DeKalb in the absence of the tort. It simply accepted 100% of DeKalb's profits as constituting Respondent's "harm" for purposes of the ratio guidepost.[9]

The Federal Circuit's failure to scrutinize the ratio between the penalty and the harm to Respondent, and its consequent use of the full measure of DeKalb's forfeited profits as Respondent's harm, are flatly inconsistent with *Cooper Industries*. There, this Court addressed whether the defendant's estimated gross profits (approximately $3 million in that case) constituted the proper measure of "harm" for purposes of *Gore*'s proportionality inquiry and concluded that they did not, because it was unrealistic to assume that the plaintiff would have captured all of the defendants' profits from the product in question absent the unlawful conduct. 532 U.S. at 441-42. On remand, the Ninth Circuit accord-

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[8] Unjust enrichment differs from many other remedies because it is measured in terms of the benefit gained by the defendant, rather than the loss suffered by the plaintiff. *See* 22 Am. Jur. 2d *Damages* § 34 (1988).

[9] Unlike the Federal Circuit, the district court explicitly acknowledged that the $15 million did *not* constitute harm suffered by Respondent. *See* App. 137a (An award based upon unjust enrichment . . . is based upon DeKalb's illicit gains—not damage to [Respondent] as a result of the fraud.").

ingly declined to consider the defendant's anticipated gross profits, found the punitive damages award disproportionate in relation to the actual damages, and reduced the $4.5 million punitive damages award to $500,000. *Leatherman*, 285 F.3d at 1149-50. The Federal Circuit, in contrast, used every penny of DeKalb's forfeited profits to justify the $50 million punitive award here.

Uncritical use of DeKalb's profits in lieu of Respondent's harm was particularly egregious because, to the extent DeKalb's profit exceeded Respondent's harm, the award of unjust enrichment itself constituted *punishment*. *Cf. Browning-Ferris of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O' Connor, J., dissenting) (evaluating constitutionality of punitive damage award by comparing it to baseline compensatory damages and not considering trebled damages in proportionality calculation). The remedy of unjust enrichment furthers some of the same purposes as punitive damages. Unjust enrichment contains "a punitive element," particularly when the recovery, as in this case, "includes not only the profits produced by the plaintiff's property or money but also those which depend upon the defendant's own effort or investment." Dan B. Dobbs, *Law of Remedies* § 4.5(5), at 655 (2d ed. 1993).[10] Like punitive damages, unjust enrichment is designed to deter future wrongful conduct.[11] Indeed, the overlap between an award

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[10] *See also* Dobbs, *Law of Remedies* § 4.1(4), at 567-68 (differentiating between non-punitive restitution and restitution which is "measured by the defendant's profits and he is forced to disgorge those profits without any credit for his own effort and investment," which "can fairly be called punitive").

[11] *See, e.g., Cross* v. *Berg Lumber Co.*, 7 P.3d 922, 934-35 (Wyo. 2000) (describing three basic justifications for accounting of profits, including "'deter[rence of] violations of law'") (quoting Cerillo, *Proving Business Damages* § 143 (2d ed. 1991)); *Warren* v. *Century Bankcorp., Inc.*, 741 P.2d 846, 852 (Okla. 1987) (comparing restitution to disgorgement, and explaining that "[i]n modern legal usage, the term has frequently been extended to include a dimension of deterrence"); Richard

of unjust enrichment and punitive damages is dramatically demonstrated by the jury instruction in this case: the jury was specifically instructed to set the level of *punitive damages* based on "whether or not the defendant profited from its conduct, and if so, whether that profit should be taken away." (App. 161a.) Thus, by including the "punitive element" of the jury's restitutionary award in the "harm" component of the ratio, the Federal Circuit not only seriously overestimated "harm" component—as *Cooper* itself recognized—but also seriously underestimated the "punishment" component of the ratio. Under the analysis required by *Gore* and *Cooper*, therefore, the ratio of punitive damages to harm may have been far higher than that calculated by the Federal Circuit, and the Federal Circuit's failure to account for that possibility requires this Court's review.

By failing to consider the punitive purpose and effect of the unjust enrichment award, and by eschewing any meaningful inquiry into the actual or potential harm Respondent suffered, the Federal Circuit abrogated its responsibility under *Cooper Industries* and *Gore* to consider carefully "the relationship between the penalty and the harm to the victim caused by the defendant's actions," 532 U.S. at 435.

C. The Federal Circuit's Refusal To Consider North Carolina's Statutory Limit On Punitive Damages Conflicts With This Court's Precedents And Decisions Of Other Courts Of Appeals.

Gore's third guidepost—"comparability"—requires reviewing courts to consider sanctions that could be imposed under the law of the relevant jurisdiction for comparable conduct. 517 U.S. at 583. North Carolina has enacted a statute limiting punitive damages to the greater of $250,000 or

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Posner, *Economic Analysis of the Law* 194 (3d ed. 1986) (arguing that restitution is appropriate in intentional tort cases "to make the tort worthless to the tortfeasor and thereby channel resource allocation through the market") (*cited in Cross*, 7 P.3d at 936).

three times the amount of compensatory damages. N.C. Gen. Stat. § 1D-25 (2001). The Federal Circuit refused to consider this statutory limit as part of its comparability analysis on the theory that the statute, although in effect by the time the complaint was filed in this case, had not been enacted when the tort occurred.[12] Again, the Federal Circuit's ruling is flatly inconsistent with *Gore*, and with the rulings of other courts of appeals.

In *Gore* this Court explained that the animating principle of the comparability inquiry is that "a reviewing court engaged in determining whether an award of damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" 517 U.S. at 583 (quoting *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., dissenting)). That principle of deference to legislative judgment applies with equal force whether the legislative judgment was exercised before or after the conduct at issue. By taking into consideration legislative judgments as to the appropriate range of sanctions, even when enacted after the tortious conduct took place, a court can ensure that the punitive damages award is the "appropri-

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[12] North Carolina courts apply that statute to cases like this one. The State enacted its punitive damages cap as part of a comprehensive overhaul of its punitive damages system in 1995. *See generally Rhyne* v. *K-Mart Corp.*, 562 S.E.2d 82 (N.C. Ct. App. 2002). Section 5 of the legislation provided that it became effective on January 1, 1996, "and applies to claims for relief arising on or after that date." 1995 N.C. Sess. Laws Ch. 514, § 5. Contrary to the interpretation applied by the Federal Circuit in this case, the preponderance of reported North Carolina opinions to have addressed the issue has held that the punitive damages reforms do apply to lawsuits filed after the statute's effective date even where the allegedly tortious conduct occurred beforehand. *Compare, e.g.*, *McNeill* v. *Holloway*, 539 S.E.2d 309, 312 (N.C. Ct. App. 2000), and *Hutelmyer* v. *Cox*, 514 S.E.2d 554, 561 (N.C. Ct. App. 1999), *with Connelly* v. *Family Inns of Am.*, 540 S.E.2d 38, 44 (N.C. Ct. App. 2000). The North Carolina Supreme Court arguably adopted this view in an opinion that did not require the court to reach the issue. *See Watson* v. *Dixon*, 532 S.E.2d 175, 176 n.1 (N.C. 2000).

ate sanction," *id.*, and not "disproportionate to the gravity of defendant's offense," *Cooper Industries*, 532 U.S. at 434. It is particularly important that federal courts applying state law give appropriate deference to the legislative judgments of state legislatures regarding the appropriate sanctions for conduct affecting that State. *See Gore*, 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). Accordingly, this Court in *Gore* specifically deemed relevant to its constitutional analysis several statutes enacted *after* the conduct at issue in that case. *Id.* at 569 n.13, 578 n.28, 584 n.40.[13]

The Federal Circuit acknowledged that in *Gore* this Court had relied on an otherwise-effective, later-enacted state statute. (App. 23a.) Remarkably, the Federal Circuit nevertheless refused to do the very same thing in this case—instead inexplicably (but expressly) rejecting the principle set forth in *Gore* that the comparability analysis rests principally on notions of deference to legislative judgment. According to the Federal Circuit, "notice," not legislative judgment, is the paramount "comparability" concern. (*Id.*)

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[13] *Cooper Industries* is to similar effect. It addressed the relevance of Oregon's unfair trade practices act to *Gore*'s comparability guidepost. The Court noted that that the comparability inquiry turned on the proper interpretation of that Oregon statute—an unresolved question of law. 532 U.S. at 442. The resolution of that issue would alter the benchmark for comparison even though the defendant would not have had actual notice of that interpretation at the time of the alleged misconduct. Nonetheless, the Court opined on what it believed to be the proper interpretation of Oregon's statute and explained how, under that interpretation, the punitive damages award might fail *Gore*'s comparability guidepost. *Id.* at 443; *see also Leatherman*, 285 F.3d at 1149 (decision on remand reducing punitive damages award and finding, in relevant part, that "the third *Gore* criterion does not support the jury's award"). Thus, like *Gore*, *Cooper Industries* demonstrates that the time of the allegedly tortious conduct does not determine which legal authority is relevant to *Gore*'s comparability guidepost.

That outright misapplication of this Court's precedent has predictably created a split of authority with three other circuits over the relevance to the comparability analysis of statutes and other legal authority that take effect only after the allegedly tortious conduct has occurred. Only the Federal Circuit has rejected the relevance of such authority to the *Gore* excessiveness inquiry.[14] In contrast, the First, Ninth, and Eleventh Circuits have held that statutes or other legal authority made effective after the allegedly tortious conduct can be relevant to the third *Gore* guidepost. *See, e.g.*, *Exxon Valdez*, 270 F.3d at 1245-46 (statute); *Johansen*, 170 F.3d at 1337-38 (administrative fine); *Zimmerman*, 262 F.3d at 82 (decisional law). Of particular relevance is the Ninth Circuit's decision in *Exxon Valdez*. There, the Court addressed the constitutionality of a punitive damages award arising out of the Exxon Valdez oil spill and, in applying *Gore*'s third guidepost, considered the relevance of a federal statute enacted after the accident that capped liability for damages arising out of an oil spill. Relying on the principle of "substantial deference to legislative judgment," enunciated in *Gore*, the Ninth Circuit recognized the relevance of the statute to its constitutional inquiry:

> Obviously Exxon could not have had notice of an Act passed after the spill. Nevertheless, the Oil Pollution Act has value as a legislative judgment, made in the course of legislative evaluation of this particular oil spill, of what amount of punishment serves the public interest in deterring and punishing, but not overdeterring, the conduct that caused the spill.

270 F.3d at 1246.

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[14] *See also Ingalls* v. *Paul Revere Life Ins. Group*, 561 N.W.2d 273, 286 (N.D. 1997) (declining to consider North Dakota statutory caps on punitive damages enacted after tortious conduct giving rise to punitive damages award).

Based in part on the relevance of this law, the Ninth Circuit vacated the punitive damages award as unconstitutionally excessive.[15]

Under the reasoning of the Ninth Circuit in *Exxon Valdez*, the North Carolina punitive damages cap would have had "value as a legislative judgment made in the course of legislative evaluation" about the proper level of damages necessary to deter allegedly tortious conduct without "over-deterring" legitimate business activity. Conversely, under the reasoning of the Federal Circuit, the *Exxon Valdez* decision was erroneous because the Oil Pollution Act, enacted after the oil spill at issue in that case, would have been irrelevant as a metric for comparison with the punitive damages award.

II. THE COURT SHOULD CONSIDER THIS CASE IN ADDITION TO *STATE FARM* v. *CAMPBELL* OR, AT A MINIMUM, SHOULD HOLD THE PETITION IN THIS CASE PENDING DECISION IN *STATE FARM*.

On June 3, 2002, this Court issued a writ of certiorari to review the decision of the Utah Supreme Court in *State Farm* v. *Campbell*, No. 01-1289. The petition in that case asks this Court to decide whether the Utah Supreme Court's decision, affirming a large punitive damages award, is inconsistent with *Gore* and with lower-court authority applying *Gore*. The issues in this case complement and amplify those presented in *State Farm* in significant respects. Consideration of this case in addition to *State Farm* would therefore permit

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[15] *See also Johansen*, 170 F.3d at 1337 (finding punitive damages award unconstitutionally excessive in relation to actual fine imposed against defendant and noting that "[w]here the state has actually imposed a penalty for the conduct at issue, the district court may choose to look at that penalty as an indication of the 'legislative judgment' as to the 'appropriate sanctions for the conduct at issue'") (*quoting Gore*, 517 U.S. at 583).

the Court more fully to explicate the important components of constitutional review of large punitive damages awards. Accordingly, this Court should grant certiorari in this case and decide it together with *State Farm*. At a minimum, the Court should hold this petition pending decision in *State Farm*.

Both this case and *State Farm* raise common issues about the proper application of *Gore*'s reprehensibility guidepost. The petition in *State Farm* (at pp. 23-25) submits that the Utah Supreme Court misapplied the reprehensibility inquiry by considering additional factors not explicitly mentioned in *Gore*. Here, the Federal Circuit committed a more egregious error—acknowledging that none of the reprehensibility factors identified in *Gore* was present (App. 18a), but nonetheless finding DeKalb's conduct reprehensible based on the jury's presumed adverse assessment of the credibility of DeKalb's witnesses, a factor mentioned nowhere in *Gore*. This case thus gives the Court an opportunity to consider the factors properly bearing upon the *Gore* reprehensibility analysis in an important additional context.

Moreover, this case and *State Farm* raise analogous issues about *Gore*'s comparability guidepost. The Federal Circuit case declined to consider *legislation* that post-dated the tortious conduct in question. *See* pp. 18-20, *supra*. In *State Farm*, the Utah Supreme Court declined to consider the actual *practices* of Utah's Insurance Commissioner in evaluating whether the punitive damages award was unconstitutionally excessive. *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, No. 981564, 2001 WL 1246676, at *17 (Utah Oct. 19, 2001), *cert. granted*, 122 S. Ct. 2326 (2002). Both cases, thus, present an opportunity for the Court to expound upon the appropriate sources of authority under *Gore*'s comparability guidepost.

The issues presented in this case complement those raised in *State Farm*, and considering the two cases together will permit the Court to articulate more comprehensively just

how the due process framework set forth in *Gore* and *Cooper* should be applied. Whereas *State Farm* presents the context of an individual customer's relationship with a large insurance interest, where bargaining power and sophistication are obviously unequal, here the issues arise in a business relationship among sophisticated commercial enterprises. In addition, the Federal Circuit's reliance on the jury's presumed witness credibility determinations to satisfy *Gore*'s reprehensibility guidepost, *supra* at pp. 11-12, and its reliance on a punitive forfeiture of the defendant's profits to constitute the "harm" component of *Gore*'s ratio guidepost, *supra* at pp. 15-18, present important doctrinal issues that can be resolved only through granting the petition in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

RICHARD L. STANLEY
HOWREY SIMON ARNOLD
& WHITE, LLP
750 Bering Drive
Houston, TX 77057
(713) 787-1400

SETH P. WAXMAN
Counsel of Record
DAVID W. OGDEN
PETER B. RUTLEDGE
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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